No. 12387

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RALPH CASEY,
EDWARD PLESA and
GEORGE LeCLAIR,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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JURISDICTION

Jurisdiction for this court to review this case is set out on Page 1 of Appellants' Brief.

STATEMENT OF THE CASE

On February 5, 1949, representatives from the Seattle Office of the Federal Communications Com-

mission were aboard a Coast Guard Cutter outside the boundaries of the State of Washington in Puget Sound and intercepted a radio message sent by the Appellants from 1:00 to 3:00 in the afternoon. This was a voice broadcast. The person broadcasting would ask occasionally of Eddie and Ralph whether the signal could be heard. These were voice signals made on the code band at approximately 3540 kilocycles.

Two amateur operators from the State of Oregon intercepted an unidentifiable signal on February 7, 1949, at about the hour of 7:10 P. M. on a frequency of approximately 3540 kilocycles, which was a voice communication on that portion of the band which is reserved for code operation.

For several days thereafter, the agents of the Federal Communications Commission heard the phantom voice at a frequency of 3540 kilocycles and attempted to locate it by direction-finding equipment. Every time the station was about to be located in a hotel, the voice would go off the air. The next day the direction-finding equipment would indicate the station was in some other hotel. (Tr. 58, 126, 158).

On or about February 10, 1949, the phantom voice transmissions on the same frequency were again heard beginning at about 12:26 P. M., which signals were determined as emitting from the Benjamin

Franklin Hotel which is located on the corner of 5th and Virginia Street in Seattle, Washington. Representatives from the Federal Communications Commission, Seattle, Washington, using direction finders, determined that the signal was coming from the Benjamin Franklin Hotel and later determined that the signal was coming from Room 1217. The Investigator in Charge heard a voice inside said room broadcasting the same identical language which he heard simultaneously over the portable radio set which another agent was carrying. This signal was intercepted at 1:46 P. M., whereupon the investigators verified the registered occupants of said hotel room and discovered that they were RALPH CASEY, GEORGE LeCLAIR and EDWARD PLESA, the appellants in this case. The Investigator in Charge then proceeded to the United States Court House, and after a delay in endeavoring to locate the United States Commissioner and the United States Marshal, returned with a Deputy U. S. Marshal armed with a warrant for the arrest of the three appellants at or about the hour of 3:20 P. M., at which time the three appellants were arrested in Room 1217 of the Benjamin Franklin Hotel, Seattle, Washington.

Meantime, shortly after 2:00 P. M. on February 10, 1949, one of the investigators of the Federal

Communications Commission was called by Mr. Standard, the Assistant Manager of the Benjamin Franklin Hotel, who informed the investigator that these three parties were about to check out and that the appellants had moved two pieces of luggage from their room to the Motor Ramp Garage which is located directly behind the hotel and is separated from the hotel only by an alley. Two of the investigators arrived at the Motor Ramp Garage between 2:30 to 2:45 P. M. and one of the investigators remained at the garage and had the attendant point out the 1948 Packard Convertible Coupe belonging to the appellants. The two investigators had the attendant unlock the car and found the two bags which were admitted in evidence in this case, one of them being open and physically showing that there was radio equipment, the second requiring the opening of a zipper to divulge the same. Two policemen in a "prowler car" were called as a precaution against any violence.

Deputy Marshal Scully arrived in Room 1217 with the Investigator in Charge at about 3:20 P. M., whereupon the three appellants were arrested, and searched the room only to find that no radio equipment was there. Immediately thereafter the Investigator in Charge called his office and was informed

that the radio equipment had been removed from the room and was in the appellants' car at the Motor Ramp Garage. He went directly there and they seized the radio transmitting equipment and receiver.

SPECIFICATIONS OF ERROR

Under the section entitled "Questions Presented" as set out in appellants' brief, there are five questions presented. In the Specifications of Error eleven assignments are set forth. However, in the Argument, only the five questions which are presented are considered. Therefore, in appellants' brief, only those questions presented which are listed under the section "Argument" in appellants' brief will be considered.

I.
ARGUMENT

The argument of appellants on Specifications of Error 1, 2 and 3 relating to suppression and exclusion of Appellants' Exhibits 5 and 6 is a "heads the defendants win, tails the government loses" argument. They maintain the actions of the Government agents in searching a car and seizing the evidence found therein without a search warrant were illegal, and further state that there is no legal way that a search warrant could have been obtained. The ap-

pellants state this very specifically in their brief on pages 18 and 19 as follows:

> "Had the officers in this case desired to obtain a warrant for the search of the automobile, it would have been necessary for them to produce evidence tending to show that the baggage contained articles used in the commission of the offense, or were of a contraband nature; otherwise, the attempt to secure the warrant would have been upon mere information and belief, which the courts have held to be insufficient as a basis for the granting of a search warrant."

Judge Bowen was not willing to accept this tortuous argument. It is difficult to conceive that any judicial decision which must necessarily be based on the "reasonableness" of a search and seizure could be so distorted as to resolve itself into a rule that makes it impossible for an officer to perform his duties.

The general ruling laid down by the Supreme Court relative to the search of vehicles in *Carroll v. United States*, 267 U.S. 132, was used by Judge Bowen as authority for admitting the Government's Exhibits 5 and 6 in evidence. An examination of that case fully justifies the Judge's ruling. The defendants contend that the ruling of the Carroll case applies only to violations of the Prohibition Act, and particularly to the provisions of that Act which provided for search on probable cause, not only of

any vehicle believed to carry contraband, but of the persons in the vehicle.

The Carroll case necessarily dwelt in part on the special provision of the National Prohibition Act since it was ruling on the constitutionality of certain provisions of that Act.

In order to make its special rulings, the Court went into the historical background of the Act and the distinctions drawn in prior acts and decisions concerning search and seizure of evidentiary material when situated in houses or other fixed structures as distinguished from vehicles capable of quick movement.

Without reference to the special provisions of the National Prohibition Act the Court made the following general statement concerning searches and seizures:

> "We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quick-

> ly moved out of the locality or jurisdiction in which the warrant must be sought."

The holdings in the Carroll case which are dependent on interpretation of the various special provisions of the Prohibition Act are not applicable to the facts of this case.

The case of *United States v. DeRi*, 322 U.S. 581, referred to in the appellants' brief, did not involve facts in any way similar to the subject case. In the DeRi case the Court held that the mere presence of a person in an automobile would not give the right to search his person without his legal arrest unless the search were made under special provisions such as were found in the National Prohibition Act. That situation is not in this case. The complaint and warrant for arrest of the appellants were issued and the defendants were arrested without benefit of any information gained from the physical evidence found in the appellants' car.

The Government officers in this case acted in the only way reasonable after the arrest of the defendant by conducting the search of the car and obtaining the evidence in question. As stated in *Rabinowitz v. U. S.*, 255 U. S. 298, as quoted on page 23 of appellants' brief, the reasonableness of a search and seizure must rest on the facts of each case.

The evidence shows that the appellants were legally arrested in the Benjamin Franklin Hotel. This is uncontested by the appellants. That just prior to arrest, and while the warrant was being obtained, the appellants had placed certain articles which appeared to be luggage in a car owned by one of the appellants and garaged in a public garage used in connection with the hotel where the appellants were registered and where the arrest was made. That Arlowe, the Government officer who obtained the warrant and accompanied the marshal to make the arrest, had no knowledge of the character of the luggage or what it contained until after the arrest. (T.R., page 86)

It was only after a futile search of the room in which the arrest was made that he learned by phone and from the witness, Ames, that the luggage in the car contained radio equipment. (Tr. 144, 145). That he went immediately to the garage and found the car and that a Mr. Donofrio, a companion of appellants who had been in the hotel room at the time of the arrest, had already arrived and declared he had been sent to remove the car. Then, and not until then, the Government officers seized the exhibits in question.

The appellants state that it would have been

impossible for the Government officers to have obtained a search warrant for the car prior to the arrest since until that time they could have only suspicion that the luggage in the car contained the same equipment used in the illegal broadcasts heard to emanate from Room 1217 of the Benjamin Franklin Hotel. In this we agree.

After the arrest and fruitless search of the room for the equipment from which the illegal broadcasts had emanated, then for the first time there was not only reasonable but compelling ground to believe that the equipment in the car was the device used to transmit the illegal signals, and that if not seized immediately it would be quickly driven away. It would have been unreasonable to have reached any other conclusion.

It would have been equally unreasonable to have delayed investigation to obtain a search warrant and not to have done just what Arlowe did, i.e., proceed immediately to the car and seize the equipment; that had to be done immediately.

Donofrio, the appellants' companion at the time of arrest, intended to drive the car away as evidenced by Mr. Donofrio arriving at the garage immediately after the arrest with the announced intention of taking the car. (Tr. 81, 194, 230, 290).

Another phase of the appellants' argument is that the car was two blocks from the scene of the arrest and so too remote to validate a search after arrest. It is common knowledge that in the business and commercial sections of a city the size of Seattle it is usually impossible to park or garage cars within the immediate block or building in which a transient may find hotel accommodations. The car of appellants was as close to the place of arrest as was reasonable. The car was in a public garage across an alley from the hotel, which garage was used in connection with the hotel and the hotel provided pickup and delivery service to guests and kept the claim checks for cars in the guest's box for their convenience. See Tr. page 213, testimony of Mr. Standard, Manager of the hotel. *The appellants had as much control of the car as possible under modern hotel garage conditions and had all the control they chose to have. They had sufficient control to cause the radio equipment to be placed in the car just prior to their arrest.*

It would have been unreasonable indeed for the Government officers to have supinely stood by and allowed Donofrio, agent of the appellants, to drive the car away without seizing the evidence when they not only had reasonable but overwhelming ground to

believe that the car contained radio equipment used to make the illegal broadcasts from the hotel room where the owner of the car had just been arrested. This is just the situation referred to in the Carroll case as not requiring a search warrant.

The conduct of the Government officers Ames and Hallock in keeping surveillance in the garage over the car and its contents after being notified that the appellants intended to check out of the hotel and had in fact caused luggage to be placed in their car, was entirely reasonable and justified. These men knew a warrant was then being obtained for the arrest of the appellants. They were not attempting to search the car or its contents to obtain evidence on which to base the arrest. The complaining officer, as stated above, with reference to the record, did not know the radio equipment was in the car until after the arrest. Ames and Hallock, according to the record on Page 140, went into the garage after receiving a check-out warning by the hotel manager.

> "Hallock and I then decided we had better go to the Motor Ramp Garage, because at that time we did not know whether or not the warrant had been served, and we figured at that time, in the event the persons operating this transmitter that we had traced were going to go somewhere, we could follow in our car."

There they learned that just before their arrival two

bags had been placed in the car. (Tr. page 141). The garage attendant opened the rear of the car where they saw that the bags, the contents of one being exposed through an open zipper, Tr. page 141, contained radio equipment. They did not remove the bags from the car or anything from the bags. (Tr. page 142).

After learning that a warrant was actually issued, a police car was dispatched to the garage by the Superior Officer of Ames and Hallock in case any trouble might develop, (Tr. pages 142-143), or for the purpose of following the appellants if they attempted to get away before the warrant was served for arrest.

> "We told the police that we didn't want them to do anything but stand by in case there was some kind of violence or possibly they could trail the car in the event it did go from the garage." (Tr. 143).

The Government officers Ames and Hallock hoped they could delay the appellants if they tried a get-away before the warrant was served; if not, they could attempt to follow them. Ames and Hallock hoped to be able to bluff and stall any get-away attempt. (Tr. page 204):

> "Yes, I was waiting upstairs, thinking some of these fellows might come in and maybe I could hold them. I had my badge to show who I was."

It would be a far stretch of imagination to twist the precautionary conduct of Ames and Hallock into an illegal search. There was in fact nothing illegal about the investigation of the car or its contents prior to the arrest. The Government officers at the garage knew a crime had been committed. The latest act of illegal broadcasting had been committed actually in the presence of Ames, one of the Government officers. Ames was within a few feet of the actual operation of the equipment in Room 1217 of the Benjamin Franklin Hotel, just outside the door of that room. Ames and Officer Arlowe double-checked the accuracy of Ames' listening equipment by having Arlowe listen at the door. He heard the identical words through the door that were heard on the listening device. (Tr. pages 137-138):

"A. I again located the center as being Room 1217, and Arlowe was with me. At one time I repeated to Arlowe what I heard so so he could verify what I heard by listening in the door.

Q. Was it the same?

A. It was the same. We compared words.

Q. How was Arlowe listening at that time?

A. He was listening with his ear to the door."

Ames and Hallock further had reliable information that the occupants of the room were checking out and had just caused bags to be placed in their

car in the garage. Ames was in a public garage where he needed no warrant to enter. He was faced with an emergency. He knew from his prior investigation that it was the practice of the operators of the broadcasting equipment to move from place to place, since much time had been spent tracking the signals from hotel to hotel for days.

The law of the Carroll case certainly justified the search of the car without a warrant.

II.

ARGUMENT ON SPECIFICATIONS OF ERROR Nos. 4 and 5

Under Section II of the Argument in appellants' brief, specifications of error 4 and 5 are argued. It seems to be the appellants' contention in these two specifications of error that Section 605 of Title 47, U.S.C., prohibits the court from admitting in evidence the contents of messages transmitted by an unlicensed radio station operated by unlicensed personnel. The pertinent portions of Section 605 are quoted in appellants' brief.

Inasmuch as Congress has required that radio stations be licensed and the personnel operating stations be licensed, Congress must certainly have intended Section 605 to apply to licensed radio stations only. It is inconceivable that Congress could have in

any way intended that the privilege set out in Section 605 should apply to unlicensed radio stations as well as to licensed radio stations.

It should be further noted that the last proviso of Section 605 excludes from the privilege set out therein radio messages which are broadcast for the use of the general public. In the case at hand, there is no evidence whatever that the messages were intended for any particular person or persons but were merely broadcast generally. There were no call letters used or any other procedure which would in any way indicate that the messages were intended to be received by any particular person. The only conclusion that can be drawn from the facts is that the information broadcast by the appellants over the unlicensed radio station was for the general use of the public. Therefore, Section 605 does not provide a sanctuary within which the appellants can hide their illegal operations.

III.

ARGUMENT ON SPECIFICATION OF ERROR No. 6

Under Section III of the appellants' argument Specification of Error No. 6 is argued. It seems to be the appellants' contention in Specification of Error No. 6 that since Section 318 of Title 47 gives the

Federal Communications Commission the power to waive or modify the requirement that every radio station be licensed, that Congress has delegated to the Federal Communications Commission to use its discretion as to what persons operating radio stations are violating the law. A careful reading of Section 318 indicates the opposite of the appellants' contention. Section 318 first states in effect that every radio station must be licensed. It then states: "Provided, however, that the Commission if it shall find that the public interest, convenience or necessity will be served thereby may waive or modify the foregoing provisions of this section for the operation of any station * * *." It is obvious from the exact language of the statute that Congress intended to make it a crime to operate an unlicensed radio station, but realized that circumstances might arise where in the public interest, convenience or necessity, it would be improper to prosecute for operating an unlicensed station. Since the operation of a radio station is a highly technical funtion, Congress wisely gave the Commission the power to waive or modify the requirement of licensing a station when such action would be in the public interest. It is, therefore, obvious that unless the Commission has so waived or modified the requirement that a radio station be licensed that anyone who operates an unlicensed radio station is in

violation of Section 318, and when such acts are done willfully may be punished under the provisions of Section 501 of Title 47. The appellants' contention is therefore, a fallacy. It is not within the discretion of the Commission to determine whether the appellants' acts constituted a crime. It is only within the discretion of the Commission to waive or modify the provisions of Section 318 under the conditions prescribed by Congress. In this case the Commission did not waive or modify the provisions of Section 318 with respect to the operation of the appellants.

The appellants would further seek to mislead the court into believing that the particular radio transmitter in this case was an innocent "walkie talkie" type of device. In order to save the appellants the expense of causing the radio to be shipped to this court, a stipulation was entered into providing that this need not be done. The reason, of course, for the appellants not wanting to ship the radio from Seattle to San Francisco is that it is so heavy and bulky that it would be quite expensive. As a practical matter the radio transmitter was admitted in evidence as an exhibit and the jury had an opportunity to examine its bulk and weight. The transmitter just fit into a trunk-like suitcase, being approximately 30″x12″x18″, the same requiring current from a com-

mercial power line for operation. The transmitter could in no sense be considered a "walkie talkie". It is true that it was portable, but certainly could not be operated as a mobile unit unless some means were provided for a regular 110-volt current and a mechanical means of transportation. The transmitter was capable of transmitting a radio signal thousands of miles.

The appellants further complain that the court did not define a radio station in its instructions, and further, that the court did not define the operation of a "walkie talkie". Certainly the general public is beyond the point in this day of enlightenment to need an explanation of the term called "radio station." There being no evidence whatever of any apparatus which might remotely resemble a "walkie talkie" in this case, there was certainly no error in the court's failing to give an instruction in that regard. The court's instructions on Counts IV, V, and VI were very clear as to exactly what the essential elements of the crime were. The jury could in no way have been misled.

The appellants further seek to manufacture some sort of an error in the court's instructions based on the facts that if the appellants were guilty of Counts I, II and III that it was improper for them to also be

convicted on Counts IV, V and VI. While it is true that some of the same elements set out in the first three counts are also present in the elements of the second three counts, that is in no way a benefit to the appellants. The essential element of Counts I, II and III is the operation of an unlicensed radio station. The essential element of Counts IV, V and VI is the operation of a radio station by unlicensel personnel. If the jury had determined that the station was licensed, but that the operators were not licensed, then the appellants would not be guilty of Counts I, II and III, but would have been guilty of Counts IV, V and VI. On the other hand, if the jury had decided that the operators of the station were licensed, but that the station itself was not licensed, then the appellants would not be guilty of Counts IV, V and VI, but would have been guilty of Counts I, II and III. It is not uncommon for defendants to be guilty of violating more than one act of Congress all in one operation.

The appellants further contend that the only testimony relating to interstate commerce is confined to the date of September 7. In this regard the appellants would apparently like to have the court overlook the testimony with regard to the broadcasts being received by vessels upon the navigable waters of Puget Sound.

It is submitted that the entire argument under Section III of the appellants' brief is without merit. The court did not commit any error whatever in his instructions in this case.

IV.
ARGUMENT ON SPECIFICATION OF ERROR No. 9

In Section IV of the Argument in the appellants' brief Specification No. 9 is argued. It seems to be the appellants' contention in Specification of Error No. 9 and the argument in regard thereto, that since there may have been other persons in the Seattle area who at one time or another have violated the law pertaining to operating radio stations and have not been prosecuted, that these appellants are not guilty themselves. The appellants quote on pages 32 and 33 of their brief certain testimony of Mr. Arlowe. This testimony is to the effect that the Federal Communications Commission first investigates apparent violations of the law to determine what the violators are doing. If the supposed violators are using the radio for more than just testing or in preparing for getting a license, a prosecution is considered. In other words, what Mr. Arlowe is stating in his testimony is that if it appears that some one is not willfully violating the law in the operation of an unlicensed

station that no prosecution is commenced. *It should be noted that Section 501 requires that the unlawful act be done willfully.* Certainly every prosecutor and every investigator is vested with some discretion as to whether or not any given act is or is not willful. In the preparation for trial of every violation of a law requiring willfulness, it is incumbent upon the prosecutor and his investigative staff to determine for themselves whether or not they have sufficient evidence to prove the element of willfulness. It is difficult to understand the appellants' contention that since every individual who has ever transmitted a radio signal without a license has not been prosecuted that somehow or another these appellants are not guilty.

The appellants again seek to mislead the court into believing that this powerful transmitter which was used by these appellants was an insignificant "walkie talkie". This point has previously been covered. The appellants further seek to minimize the offense by stating that the transmitter was worth only $50.00. This testimony arises from the lips of the appellants themselves and the jury was not compelled to believe such testimony. As a practical matter, the jury, after examining the intricate mechanism of the transmitter, would certainly be justified in de-

termining that its value was probably ten or twenty-fold that amount. The appellants further seek to mislead the court into believing that there was no evidence that any signal was transmitted by the appellants' transmitter. The appellants, of course, rely upon the testimony of the appellants themselves that they did not know whether or not the transmitter was working. In this regard the appellants seek to overlook the fact that the appellants move from hotel to hotel virtually every day. The only explanation for this conduct is that the appellants knew that if they stayed in one place they could be located by direction-finding equipment. Their actions certainly belie their statements that they did not know whether or not the transmitter was operating. This was a matter for the jury to consider, and having decided the same adversely to the appellants, that decision can not now be reversed by this court, there being ample evidence to support it. It should further be called to the court's attention that the law does not require the appellants' signal to have been received by the person for whom it was intended to be guilty.

V.

ARGUMENT ON SPECIFICATION OF ERROR No. 10

In Section V of the Argument set out in appellants' brief Specification of Error No. 10 is argued. The argument on Specification No. 10 is merely a rehash of the arguments set out in Sections III and IV of the appellants' brief. In Section V the appellants further argue that Sections 301 and 318 of Title 47 are unconstitutional, based on the false premise that a violation of these sections can only be committed upon the whim or caprice of an investigating agent. As has been previously stated, Section 501 requires violations of Sections 301 and 318 to have been committed willfully before a defendant can be convicted. The only discretion which has been exercised in this case by the investigative agency and the prosecutor is in determining in their own minds whether or not there was sufficient evidence to prove willfulness. This having been determined, and a grand jury having returned an Indictment, and a jury having found that there was willfulness on the part of the appellants, it is of no avail to the appellants that perhaps in some other cases there should have been a prosecution instituted which was not, and further, there being no evidence in this case to show that the appellants' actions were in any way justi-

fied in the interest of the public, convenience or necessity, there was certainly no basis upon which the Commission could in any way waive or modify the provisions of Section 318 with regard to the operation of the transmitter being used by these appellants. It is interesting to note that the appellants have quoted only a portion of Sections 2, 3 and 4 of Vol. 11, American Jurisprudence, Page 947. The rest of that quotation goes on to state: " The modern tendency is to be more liberal in permitting grants of discretion to administrative bodies or officers in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases."

CONCLUSION

We dare, for but a single instant, to dwell upon the utter chaos which would exist if the court should find, as a matter of law that these appellants have not violated Sections 301 and 318 of the Communications Act of 1934, as amended. Such a decision would straightway open the door for countless thousands of amateur, as well as commercial, operators of transmitting equipment to jam all the frequencies of the radio spectrum with an uncontrolled flow of traffic. The result would be utter confusion to the public services now rendered by organized and regulated radio operators, would threaten and imperil our national security during this period of war, and would create a serious threat to the integrity of the operation of radio safety and signal devices relied upon by aircraft, the merchant marine and others. The problem of monitoring or policing the airways would be rendered well nigh impossible.

In view of the fact that Congress has already endeavored to exercise the full gamut of its powers in this field, the situation thus created, it must be noted, could not be cured merely by the revision of the instant statute by Congress. In order to find these appellants not guilty, the court must find that there is a hiatus in the field of radio transmission where it is

possible to emit radio signals having no relation to, or effect upon, the sphere of Federal regulation, i.e., interstate commerce. As a result, it would appear that Congress could never invade that segment of activity for the purpose of regulating it.

In conclusion, it is submitted that the search and seizure were not only reasonable under the circumstances, but were incident to a lawful arrest and, further, that the trial judge did not commit any error whatever as claimed by the appellants in their Specifications of Error.

Respectfully submitted,

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